UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD SAN FRANCISCO DIVISION OF JUDGES

FOSTER POULTRY FARMS

and Case No. 32-CA-24615

UNITED FOOD & COMMERCIAL WORKERS 8 GOLDEN STATE

D.Criss Parker, Esq., Oakland, CA, for the General Counsel Steven R. Feldstein, Esq., of Goodwin Procter LLP, Menlo Park, CA, for the Respondent Mike Fursman, Meat Division Coordinator, UFCW 8 Golden State, Fresno, CA, for the Union

DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge: Pursuant to notice, a hearing in this matter was held before me in Porterville, California on November 18 and 19, 2009. The captioned charge was filed on June 30, 2009 by United Food & Commercial Workers 8 Golden State (Union), and a first amended charge was filed by the Union on August 27, 2009. On September 11, 2009, the Regional Director for Region 32 of the National Labor Relations Board (Board) issued a complaint and notice of hearing alleging violations by Foster Poultry Farms (Respondent) of Section 8(a)(1) of the National Labor Relations Act, as amended (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from Counsel for the General Counsel (General Counsel) and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted. I make the following:

Findings of Fact

I. Jurisdiction

The Respondent, a California corporation with its principal office located in Livingston, California, is engaged in the processing of poultry at its Porterville, California facility. In the course and conduct of its business operations, the Respondent annually sells and ships poultry products valued in excess of \$50,000 to firms located outside the State of California. It is admitted, and I find, that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organizations Involved

It is admitted, and I find, that the Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act,

III. Alleged Unfair Labor Practices

Issues

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The principal issues in this proceeding are whether the Respondent has violated Section 8(a)(1) of the Act by promising its employees increased sick leave and vacation benefits, and thereafter granting such benefits, in order to dissuade them from supporting the Union.

15 Facts

On December 13, 2007, an initial election was held among the Respondent's approximately 400 Porterville employees. The Union lost by a substantial margin and filed election objections. On August 28, 2008, the Board issued a decision directing a second election. See *Foster Poultry Farms*, 352 NLRB 1147 (2008). As a result of blocking charges filed by the Union, including the instant charge, a second election has not yet been scheduled.

Timothy Walsh, Respondent's only witness in this proceeding, is Respondent's senior vice president of human resources. Walsh testified the Respondent has a total of some 12 thousand employees, most of whom are employed at one of its ten major facilities located in various states. The employees at most of these facilities are represented by various unions. Some plants and other operations, such as ranches, hatcheries, and feed mills, employing some 3000 employees, are not unionized.

The Porterville plant, which has remained non-union, has been in operation for about ten years. Walsh testified that until a new plant becomes profitable the Respondent will operate it on a start-up basis for about three to five years, with "very lean benefits until that facility is up and running." After this start-up period, according to Walsh, and assuming the plant has not become unionized in the interim, company policy mandates that the employees be given the identical non-union benefit package that is in place at all of the Respondent's established non-union plants.¹

Walsh testified that about five or six years ago, that is, after the Porterville plant had been in operation for some four or five years, it was decided to "roll Porterville into the Foster Farms non-union benefit programs." Walsh believed the Porterville facility was in compliance with this policy. However, on about January 20, 2009², Walsh received a phone call from a "fairly new" employee, Ana Pan, Respondent's director of human resources for the Fresno, California area, who was attending a training session regarding benefits. Pan advised Walsh that the Porterville sick leave and vacation benefits were inferior to and not in compliance with company-wide policy for non-union plants.³ Thereupon Walsh made the immediate decision to correct this mistake as expeditiously as possible. The new and superior sick leave and vacation

¹ There is no showing that employees are ever made aware of such a policy.

² All dates or time periods herein are within 2009 unless otherwise specified.

³ According to Wash, the company-wide non-union vacation policy has been in effect since about 1995, and the company-wide non-union sick leave policy has been in effect "for at least a decade."

benefits for the four hundred Porterville employees was announced to the employees on about February 12; however, in order to make sure the payroll system had been properly programmed for the changes, the benefits were not to become effective until April 1.

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Walsh testified that when the Respondent makes benefit changes, "we tend to do it in a very positive fashion to make people--or help people reflect upon the level of benefits that they have. It's not uncommon." Walsh also agreed that a reason why the Respondent wanted employees to reflect favorably upon their benefits is so they would not think they needed "a union or another employer." For these reasons Walsh decided that the change be announced and characterized in a positive manner, and that it not be described to employees as simply an obligatory change undertaken for the purpose of aligning or conforming the Porterville employees' benefits to existing company-wide policy.

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Walsh testified there was one other comparable incident in the "live production" side of the business, primarily ranches. Thus, in 2007 or 2008 it was discovered that ranch employees, hatchery employees, and other non-union employees were not being paid time and a half for holiday work, as were all other non-union employees of the company. When notified of this, Walsh immediately took measures to increase the holiday pay benefit of these employees so that it would conform to that of the other non-union employees. Unlike the instant situation, *infra*, these employees were not so advised by memorandum stating that the new benefits were being granted as part of the Respondent's non-union benefit package. Rather, according to Walsh live production supervisors opt, in most all cases, during routine weekly visits, to go out and talk with the ranch managers and the assistant ranch managers⁴ who work on these ranches and tell them about benefit changes. And, according to Walsh, "that's, in fact, how they did this change with those folks. They met personally to inform them of the good news of their change of getting paid time and a half for holiday hours." Walsh further testified he had been advised that the "good news" had been conveyed to the ranch employees in a "positive fashion."

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In a leaflet distributed to the Porterville employees on October 31, 2008, entitled "So...What's New?," Porterville Plant Manager Henry Fuse advised the employees, *inter alia*, that there would be another election as a result of the aforementioned August, 2008 Board decision, and that the Respondent would keep the employees informed as to when the new election would take place. The leaflet ends with the statement: "Foster Farms remains committed to the belief that employees should not be required to join a union or pay union dues to work at the Porterville Plant."

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Union International Representative Daniel Serrano testified that in January and February the Union brought in a staff to do house visits with the Porterville workforce. In January, the Union distributed a leaflet to Porterville employees advising them of the Board's aforementioned decision and stating, inter alia, "You will be notified when the <u>NEW ELECTION TO VOTE YES</u> FOR <u>UFCW</u> will take place." (Original emphasis.)⁶

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⁴ It appears that the ranch managers and assistant ranch managers are employees within the meaning of the Act.

⁵ Walsh's admittedly hearsay account of how this matter was handled is abbreviated and uncorroborated. Under the circumstances, I find Walsh's testimony in this regard to have questionable probative value.

⁶ The parties stipulated that "[T]he Union met with the employees, leafleted outside the employee (sic) facility on numerous occasions since the election occurred at the end on 2007, up until the present date."

On January 6, Porterville Plant Manger Fuse distributed another "So...What's New?" leaflet, urging employees to "think twice" before signing union authorization cards because, in the event the then-proposed federal legislation entitled the "Employee Free Choice Act" became law, "just signing a card means the employee has "voted" for union representation." This leaflet also concludes with the statement: "Foster Farms remains committed to the belief that employees should not be required to join a union or pay union dues to work at the Porterville Plant. (Original emphasis.)

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During a presentation to employees by plant management sometime in January, Porterville managers gave a presentation to employees, described by Walsh as "a recap of 2008 for employees, talking about the company values and whatnot." During this presentation, the employees were told, *inter alia*, "We believe you will have better wages & benefits by remaining non-union.. and you should not have to pay union dues to work at the Porterville Plant." (Emphasis in original.) The employees were thanked "for making 2008 a successful year," and told: "We want Foster Farms and the Porterville plant to be "Your Employer of Choice ...Let's make 2009 our best year EVER!" (Emphasis in original.)

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On February 9, Plant Manager Fuse distributed a campaign leaflet to the Porterville employees covering a variety of matters, and advising that Union representatives were visiting employees' homes and making promises and guarantees they cannot keep, such as guaranteeing them jobs, higher wages, and better benefits. Again, this leaflet concludes with the statement: "Foster Farms remains committed to the belief that employees should not be required to join a union or pay union dues to work at the Porterville Plant."

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On or about February 12, Plant Manager Fuse, together with other management representatives, held a series of group meetings attended by all of the Porterville employees. The meetings were specifically called so that the new benefits could be announced to the employees. During the meeting the following February 12 memorandum, addressed to "All Porterville Hourly Employees" and entitled "New and Improved Sick and Vacation Benefits," was read to the assembled employees:

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As part of our ongoing effort to continuously review and improve non-union benefit programs, I am very pleased to announce that effective April 1, 2009, Foster Farms will be increasing the amount of sick and vacation time that you will be eligible to earn. <u>All regular full-time employees, can now look forward to the following improved changes to your sick and vacation benefits:</u>

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Yes this is a real change and <u>represents a significant increase of hundreds, if not thousands of hours of paid time off</u> over the course of your career with Foster Farms!⁷ I hope these additional benefits allow you to enjoy vacation time off with your loved ones and that Foster Farms has helped to add peace of mind that should you become ill you will have sick hours available to help you get through those difficult times.

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⁷ An internal memorandum comparing the "Current Sick Plan," that provides 16 hours of sick leave per year, with the new "Non-Union' Sick Plan" that will provide 48 hours of sick leave per year, shows an additional annual cost of \$136,289.60; the same document comparing the "Current Vacation Plan" with the new "Non-Union' Vacation Plan" shows an additional annual cost of \$68,718.00.

I will schedule meetings to meet with each and all of you and answer any question you may have. In the meantime if you have any questions about these new and improved benefit plans and what they mean to you, please feel free to ask me, your Supervisor or Human Resources for assistance.

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On behalf of the Porterville Management Team and Foster Farms, thank you for all you do! We greatly appreciate it! (Original emphasis.)

It appears that during this series of meetings the foregoing memorandum was read in English, translated from English to Spanish, and distributed to the assembled employees, both in English and Spanish written versions. Various Spanish-speaking employees, during their testimony, gave varying versions of the verbal Spanish translation that differs somewhat from the written version. While, in the absence of any contrary testimony presented by the Respondent, I credit their testimony, I find that the written Spanish version, which the employees had in their possession, sufficiently conveys the essence of the meetings. Therefore, it seems unnecessary to specifically recount their testimony.⁸

In a "So...What's New?" leaflet to all employees dated February 23, Plant Manager Fuse states, *inter alia*:

It appears the union is working hard to discredit your new vacation and sick pay benefits. Please ask the union representative <u>"Do any Foster Farms union plants have better vacation or sick benefits?"...the answer will be "NO." ...unless the union chooses not to tell you the truth!</u>

Foster Farms believes it is in your best interest to "say NO to unions"...and say "NO to paying dues". It's your money...don't let the union spend it for you! I ask that you please think twice before signing a union card which could require you to pay union dues! (Emphasis in original.)

On March 27, the Respondent distributed a detailed leaflet to its employees comparing the costs and coverage of the "Non-Union PPO Plan" and the "Non-Union Basic Plan" with the "Union Plan" the Union had negotiated with the Respondent's Belgravia Plant. It also compared the "Non-Union Life Insurance Plan" with the "Union Life Insurance Plan." The leaflet states, "The Porterville NON-union Medical benefits plan provides <u>BETTER</u> medical, dental, vision and life insurance benefits in over 40 different areas." (Emphasis in original.)

On March 31, the day before the new sick leave and vacation benefits were to become effective, Respondent distributed a detailed leaflet to its employees comparing wages and the wage progression rates of "Porterville Non-Union" employees and "Belgravia Union" employees. The leaflet states, *inter alia*, "The Union just negotiated the above Belgravia Plant wages and as you can see... <u>Porterville wage packages are still superior to Belgravia!</u>" The leaflet goes on to state, "I believe the answer is clear... <u>Stay non-union!</u> (Emphasis in original.)

⁸ These employees understood from the memorandum and verbal translation, describing the new and improved benefits as part of the Respondent's "non-union benefit programs," that they would have these benefits only without a union; that is, if they voted for the Union they would not be entitled to these benefits. While this seems to be a reasonable interpretation of the memorandum, another interpretation would be, simply, that these were the benefits enjoyed by the Respondent's non-union employees, with no further implicit connotation.

Analysis and Conclusions

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The General Counsel maintains that the Respondent's grant of benefits is per se unlawful because there was no justification or legitimate business-related reason to increase benefits. Thus, contrary to the Respondent's position, the General Counsel maintains there was no administrative mistake to correct; rather, the Respondent's intention to always keep the Porterville employees' sick leave and vacation benefits below those of the other non-union employees was revisited and revised as a result of the Union's election campaign. The evidence in support of this rationale is circumstantial: the five-year delay in failing to discover the alleged mistake; the failure of the Respondent to call as a witness the Respondent's human resources director who allegedly discovered the alleged mistake; and finally, the Respondent's granting of such benefits during an active anti-union campaign and prior to a second election that, at the request of the Union, could have been scheduled within a short time.

While the General Counsel's argument is persuasive, nevertheless I believe that if the Respondent's "discovery" of the benefit discrepancy was simply fabricated in an effort to influence employees support for the Union, the Respondent would have seized upon this approach prior to the first election. Further, the Respondent committed no unfair labor practices prior to the first election, which was set aside because of "election interference" matters resulting from the Respondent's failure to properly reproduce a Board ballot in a leaflet it distributed to employees. Accordingly, I conclude the circumstantial evidence is insufficient to substantiate the General Counsel's contention that the Respondent had no legitimate business justification for granting benefits when it did.

Clearly, as the Respondent maintains, once it discovered the mistake, it had the right to correct the mistake as soon as practicable, without waiting an indefinite period until after the second election; and this is what it most likely would have done in the absence of a union campaign or a pending election. See United Airlines Services Corp., 290 NLRB 954 (1988): "As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene." (Citations omitted.) However, this is not the end of the inquiry.

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The Respondent argues that it has always conferred benefits in the most positive manner to its employees. In accordance with this principle, the increase in benefits was not described to the Porterville employees as simply an obligatory change undertaken for the purpose of aligning or conforming the Porterville employees' benefits to existing company-wide policy. In other words, the Respondent wanted to make it appear that the new benefits were being conferred as a result of its announced "ongoing effort to continuously review and improve non-union benefit programs." Indeed, it is argued, the Respondent was simply doing what it had done in 2007 or 2008 when a verbal announcement of increased overtime pay was made to ranch employees and other non-union employees after it was discovered their overtime pay was

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⁹ Nor were the employees told that the benefit increases had nothing to do with the union or the election, and that they would have received the benefits whether or not there was an ongoing union campaign or a pending election.

¹⁰ There is no record evidence that the Porterville employees had ever been previously advised of such an ongoing and continuous review of benefits.

not in compliance with company policy. Therefore, the Respondent maintains, by putting a positive spin on its mistake it was acting in conformity with past practice; and since the Porterville employees were immediately entitled to the new benefits, the Respondent's announcement and granting of the benefits did not violate the Act.

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I disagree with the Respondent's argument for the following reasons. Throughout the instant union campaign the Respondent has attempted to convince the Porterville employees that they are better off without a union. After the first election, and during the "critical period" prior to a second election, ¹¹ the Respondent continued its vigorous anti-union campaign as is readily apparent from the campaign leaflets it promulgated; and, in addition, it contemporaneously announced and granted new and improved sick leave and vacation benefits for all the approximately 400 Porterville employees. The announcement was orchestrated with a positive flare, during a series of group meetings, attended by Respondent's management. ¹² During these meetings, the Respondent elected not to advise the Porterville employees of the true reason for the additional benefits, namely, that such belated benefits were mandated by long-standing company policy designed to provide all non-union employees with equal benefits. Rather, by its omission of the true reason, and its emphasis of an expedient or contrived reason, namely that the "new and improved" benefits were being conferred "As part of our ongoing effort to continuously review and improve non-union benefit programs," the Respondent intentionally misled it employees. ¹³

Walsh acknowledged that a reason the Respondent wanted the Porterville employees to reflect favorably upon their new benefits is so they would not think they needed "a union or another employer." Had they been told the truth they would perhaps not have reflected as favorably upon the belated benefit increase as the Respondent would have hoped. While the true explanation underlying the granting of benefits would not have been as effective an anti-union campaign weapon as the contrived reason, nevertheless it would have been candid rather than misleading, and the employees receiving the benefits could at least have reflected upon and evaluated their new benefits in this light.

If the Respondent elects to grant benefits to its employees in the absence of a union campaign or pending election, the employees are not likely to reflect upon the conferral of such benefits as being motivated by anti-union considerations in an effort to influence their choice. The converse is true during a union campaign or pending election. Thus, in the instant situation, I find the Respondent was not at liberty to do what it arguably would have done had there been no union campaign or pending election. I believe it had two reasonable options under the circumstances: delay the announcement and granting of benefits until after the second election,

¹¹ See *MEMC Electronic Material, Inc.*, 342 NLRB 1172, 1175, fn. 7: "Indeed, the Board has found that conferring benefits in instances where an election is not presently scheduled but the possibility of an election remains very real, violates the Act. *See Wis-Pack Foods, Inc.*, 319 NLRB 933, 939 (1995), enfd. 125 F.3d 518 (7th Cir. 1997)."

¹² The parties stipulated there were frequent communications among Respondent's upper management, during the period from August 28, 2008 to June 1, 2009, in which Respondent's officials considered and evaluated how Respondent should respond to the Union's organizing campaign.

¹³ The quoted language is untrue and misleading because it would reasonably cause the Porterville employees to believe the "new and improved" benefits resulted from current area wage and benefit surveys, rather than from a review conducted at least five years before; further, the five-year benefit deficiency was discovered by accident rather than through some ongoing continuous review process.

or tell the employees the truth about why it had decided to grant the benefits at that particular time and, in addition, make clear to them why they would have received the benefits even if the Union was not on the scene or an election was pending.

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Regardless of the manner in which the Respondent would have handled the identical situation in the absence of an active union campaign, I find the Respondent orchestrated the announcement and granting of the benefits in such a manner as to cause its Porterville employees to believe that the new benefits were being conferred solely because of an impending second election in an effort to diminish their support for the Union. By such conduct, I find the Respondent has violated and is violating Section 8(a)(1) of the Act . *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964); *Wiers International Trucks*, 353 NLRB No. 48, slip op, at p.17 (2008).

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Conclusions of Law and Recommendations

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent has violated Section 8(a) (1) of the Act as found herein.

The Remedy

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Having found the Respondent Foster Poultry Farms has violated and is violating Section 8(a)(1) of the Act, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix." ¹⁴

ORDER¹⁵

The Respondent, Foster Poultry Farms, its officers, agents, successors, and assigns, shall:

- 1. Cease and desist from:
- (a) Announcing and granting benefits to its Porterville plant employees in a manner designed to influence their vote in a Board-conducted election.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act:

¹⁴ Both English and Spanish versions of the notice should be posted.

¹⁵ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

.5	(a) Within 14 days after service by the Region, post at its Porterville, California facilit copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 32 after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notice are not altered, defaced, or covered by any other material.		
(b) Within 21 days after service by the Regional Office, file with the Regional for Region 32 a sworn certification of a responsible official on a form provided by the attesting to the steps that Respondent has taken to comply.			
15	Dated: Washington, .D.C. March 9, 2010		
20		Gerald A. Wacknov Administrative Law Judge	
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¹⁶ If this Order is enforced by a judgment of the United States Court of Appeals, the wording in the notice reading, "Posted by Order of the National Labor Relations Board," shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT announce and grant benefits to you in a manner designed to influence your vote in an election conducted by the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the foregoing rights guaranteed them by Section 7 of the Act.

			FOSTER POULTRY FARMS	
			(Employer)	
Dated:	By:			
	-	(Representative)	(Title)	

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be referred to the Board's office, 1301 Clay Street, Suite 300N, Oakland, CA 94612, Phone 510-637-3300.